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No. 08-27

Supreme Court, U.S.
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In The
Supreme Court of the United States

PETER HELLMUTH EGGERT,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Eleventh Court Of Appeals
Sitting In Eastland, Texas

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S QUESTIONS PRESENTED - *RESTATED*

1. Can the Texas Appellate Courts simply ignore allegations and proof of deprivation of a person's constitutionally guaranteed right to an impartial jury in a criminal case under the Sixth Amendment to the Constitution of the United States?

2. Did the Texas Courts violate Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

RESPONDENT'S QUESTIONS IN OPPOSITION PRESENTED – *RESTATED*

1. Does the Court have jurisdiction under 28 U.S.C. § 1257(a) to review the Texas Eleventh Court of Appeals' decision below, denying Petitioner Eggert's supplemental motion for rehearing, in which Eggert first raised the claims presented here?

2. Should the Court grant a petition for a writ of certiorari where Petitioner failed to follow the appropriate state appellate rules to obtain review of his federal claims?

TABLE OF AUTHORITIES

Sixth Amendment
to the United States Constitution *2*

Supreme Court Rule 29.3 ..... *1*

Federal Cases

Richards v. Jefferson County, Ala.,
517 U.S. 793, 797 n. 3 (1996)..... *5*

Brinkerhoff-Faris Trust Co. v. Hill,
281 U.S. 673, 677-78 (1930)..... *5*

Estate of Wilson v. Aiken Industries, Inc.,
439 U.S. 877 (1978)..... *6*

Texas Cases

Eggert v. State,
No. 11-05-00234-CR (Tex.App.-Eastland,

Delivered June 7, 2007)
(not designated for publication). *4*

Gallardo v. State,
No. 11-04-00049-CR (Tex.App.-Eastland,
Sept. 30, 2004, no pet.). *2*

Texas Provisions and Statutes

Texas Penal Code Ann. 21.11(a)(2) (Vernon 2003)..... *2*

Report to the Supreme Court of Texas by the
Task Force on Jury Assembly and Administration.....*7*

Other

Supreme Court Practice, Eighth Edition;
The Bureau of National Affairs. Inc.;
ISBN 1-57018-224-8 .....*5*

OBJECTION

Petitioner respectfully objects to Respondent's *Brief in Opposition* because it is defective on its face in that, on the cover of the brief, Respondent wrongfully states:
"On Petition for Writ of Certiorari to the **Texas Court of Criminal Appeals**" when the petition at bar is clearly addressed to the **Texas Eleventh Court of Appeals, Sitting in Eastland, Texas.**[1]
Furthermore, Respondent only served 2 (two) copies of the brief to Petitioner, which is in violation of Rule 29.3.
Petitioner suggests that because of the aforesaid, and in light of the fact that Respondent did not file a waiver or response on the proper due-date and had to be directed by the Court to file such response, Respondent demonstrated disregard and confused handling of the serious matter before the Court.

MEMORANDUM

Respondent, in its *Brief in Opposition*, does not respond to the Questions Presented to the Court, but instead raises its own question of whether the Court has jurisdiction over the petition before the Court.

Respondent states that the Eleventh Court of Appeals for the State of Texas[2] was essentially barred by Texas procedural rules and case law from considering Petitioner's newly discovered evidence

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1 Emphasis added.
2 "11th COA"

of the violation of his constitutional Sixth Amendment right to an impartial jury because such new evidence was not part of the record and that there has never been any precedent which could have allowed the 11th COA to even address such new evidence.

Such statement is patently false, because:
On September 30, 2004, in *Gallardo v. State*,[3] the case which triggered all subsequent prosecution against Petitioner, including the case at bar, the 11th COA readily considered and commented in its opinion that:

> "In his third issue on appeal, appellant argues that 'new evidence' has been discovered that should be considered in reversing the judgment of the trial court. Appellant obtained a written statement from the chief of police at the time of the offense. The officer stated that he believed the incident between appellant [Gallardo] and the victim was 'consensual.' Appellant was convicted of indecency with a child by exposure. TEX. PENAL CODE ANN. '21.11(a)(2) (Vernon 2003). It is an affirmative defense if the actor was not more than three years older than the victim and if the actor did not use duress, force, or a threat against victim. [The penal code] does not require that the State show that the offense was committed without the consent of the victim. (Citations omitted). The 'new evidence' does not establish that appellant is

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3 Gallardo v. State, No. 11-04-00049-CR (Tex.App.—Eastland) September 30, 2004.

> innocent of the offense. (Citations omitted). Appellant's third issue on appeal is overruled. The judgment of the trial court is affirmed."

Nowhere in the aforesaid opinion does the 11th COA state that it could not, or would not, consider the *new evidence* because it had not been part of the record.

It appears thus that the 11th COA either has the discretionary power to consider matters outside of the record or that it creates such power whenever it deems appropriate.

Ironically, the Attorney General of Texas, as attorney for Respondent, actually confirms the legal impossibility of the allegations against Petitioner as set forth in the instant case (Cause No. CR12121) by the grand jury indictment, which declares:

> "The GRAND JURY, for the County of Erath, State of Texas, duly selected, empanelled, sworn, charged, and organized as such at the January Term, A.D., 2005, of the 266th Judicial District Court for said County, upon their oath presented in and to said Court at said term that PETER HELLMUTH EGGERT, hereinafter styled Defendant, on or about the 5th day of April, A.D., 2004, and before the presentment of this indictment, in the County and State aforesaid, did then and there, with intent to commit the felony offense of fabricating physical evidence, agreed with Mikel Peter Eggert that one of them would engage in conduct that would

> constitute said offense, to-wit: the said Peter Hellmuth Eggert, knowing that an official proceeding was pending, to-wit: **Cause No. 11-04-00049-CR in the Court of Appeals for the 11th District of Texas, entitled Marcus Gallardo v. State of Texas**, made, presented or used a record or document, to-wit: the purported affidavit of Kim Whiteley, or Michele Whiteley, with knowledge of its falsity and with intent to affect the course of outcome of the official proceeding described above." (emphasis added).

After Petitioner's recusal motion to the 11th COA[4] , Petitioner presented the following issue in his appeal brief and in his reply to the State's brief:

> "Was the evidence legally and factually sufficient to support a guilty verdict for conspiracy to fabricate evidence, where the State had to prove the affidavits were prepared with the intent to alter the proceedings in the Court of Appeals, **since the affidavits were not in the record, and could not have been considered by the Court?"** (Emphasis added).

To which the 11th COA replied in its unpublished opinion[5]

> "The State was not required to prove that this court could have considered the Whiteley

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[4] Petitioner's Recusal Motion was ultimately denied by the 11th COA.

[5] *Eggert v. State*, No. 11-05-00234-CR (Tex.App.—Eastland) June 7, 2007.

affidavits or that those affidavits would have affected the outcome of the Gallardo appeal."[6]

Petitioner respectfully emphasizes that the State of Texas cannot have it both ways.

In its Eighth Edition, the Supreme Court Practice[7] explains:

"There are situations where raising the federal question for the first time in the petition for rehearing is timely even though the state court says nothing in denying the petition. ... In all cases cited by the Court, the aggrieved party had made some kind of effort, such as filing a rehearing petition, to bring the new federal claim to the attention of the state court."[8]

Jurisdiction is proper and timely before the Court even though the state courts said nothing in denying or refusing the appeal.

Petitioner first brought the federal question in the case at bar immediately after he became aware of Respondent's violation of his constitutional right to an impartial jury in state trial court. The federal

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[6] It is noteworthy that the 11th COA did not even address the fact that the "affidavits" had not been part of the record. It is also noteworthy that in Petitioner's diligent research and observation of the 11th COA's rulings since 2004, Petitioner has not found a single criminal case which the appointed justices of the 11th COA have not affirmed.

[7] Supreme Court Practice, Eighth Edition; The Bureau of National Affairs, Inc.; ISBN 1-57018-224-8

[8] *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n. 3 (1996); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930.

question in the case at bar was unexpectedly discovered by Petitioner and Petitioner had no prior opportunity to anticipate or assert this particular federal question. Petitioner's Supplemental Motion for Rehearing in the proceedings before the Eleventh Court of Appeals of the State of Texas constituted the first and probably only chance to present the matter to any state court. The fact that the Texas appellate courts *simply* denied and/or refused Petitioner's federal question assertions effectively created an unexpected decision of the highest state courts.

Petitioner has exhausted every procedural avenue available to him and Respondent's insinuation that Petitioner should have first gone to jail and then raise the federal question in a *habeas corpus* proceeding is so absurd that it does not deserve any further comment in this reply memorandum.

In his concurring opinion in *Estate of Wilson v. Aiken Industries, Inc.*[9] Justice Blackmun wrote:

> "It is well established that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. (citations omitted). There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling of the state court, the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized."

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[9] *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877 (1978).

This is a case of deliberate prosecutorial misconduct by "special prosecutor" Garry Lewellen and Respondent is now trying to defend such misconduct by its challenge to the jurisdiction of the Court.

The Texas Supreme Court's Task Force, on February 2, 2007, has established that:

> "... Lawyers have expressed suspicion that in certain Texas counties there may be official tampering with the jury process behind closed doors, which tilts the process in favor of one litigant and against another. Such concerns were expressed publicly at a meeting of the Supreme Court Advisory Committee on May 2005. ..."

The Task Force further stated that while it was "aware of no hard proof of malevolent [jury] tampering" its members were made aware of such ongoing abuse of fundamental justice by some officials in some counties.

Here, the 11th COA didn't even allow Petitioner a *Harm Analysis* hearing as required by the state appellate rules.

Petitioner also avers that Respondent's sole focus on the jurisdictional issue indicates that the state of Texas does not have any viable response to the true questions concerning the matters and issues in the instant cause.

CONCLUSION

For the reasons shown, Petitioner states that Respondent's allegation that the Court does not have jurisdiction is unfounded, directly contradicts the actions of the 11th COA, and does not invalidate Petitioner's constitutionally guaranteed right to an impartial jury.

Petitioner prays that his petition for writ of certiorari be granted and that Petitioner be allowed to fully brief the Court on all merits of the case.

Respectfully submitted,

s/s (Peter H. Eggert)

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